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Kivalina Relocation Planning Committee

10 **IN THE UNITED STATES DISTRICT COURT**
11 **FOR THE DISTRICT OF ALASKA AT ANCHORAGE**

13 KIVALINA RELOCATION PLANNING
14 COMMITTEE

15 Plaintiff,

16 v.

17 TECK COMINCO ALASKA INCORPORATED,

18 Defendant.

Case No. A02-231 CV(JWS)

PLAINTIFF'S OPPOSITION
TO MOTION FOR
RECONSIDERATION BY
NORTHWEST ARCTIC
BOROUGH

20 **I. INTRODUCTION**

21 Plaintiff Kivalina Relocation Planning Committee ("KRPC") respectfully opposes the
22 Motion for Reconsideration brought by Northwest Arctic Borough ("NAB"). This is a Clean
23 Water Act suit between KRPC and Teck Cominco Alaska, Incorporated ("Teck Cominco").
24 regarding Teck Cominco's thousands of violations of its discharge permits issued by the U.S.
25 Environmental Protection Agency ("EPA"). NAB does not meet the criteria for
26 reconsideration: it presents no new evidence, fails to describe any change in controlling law,
27 and cannot establish any clear error. Further, NAB does not meet any of the requirements for
28 intervention as a matter of right, nor does it meet the statutory criteria for permissive

Plaintiff's Opposition to Motion for
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1 intervention. NAB is not the owner of the mine, is not the holder of the two permits at issue
2 here, is not responsible for any of the 2,171 violations documented in KRPC's suit, and has no
3 ability to remedy any of those violations. NAB's Motion is little more than a lengthy
4 disagreement with this Court's January 7, 2003 Order, and it should be denied.

5 **II. BACKGROUND**

6 On September 19, 2002, KRPC filed a complaint for injunctive relief and civil penalties
7 under the Federal Water Pollution Control Act (also known as the Clean Water Act), 33 U.S.C.
8 §§1251-1387, alleging that Teck Cominco has violated its National Pollutant Discharge
9 Elimination System ("NPDES") permits related to its operation of the Red Dog Mine and Port
10 Site. On November 4, 2002, NAB filed a motion seeking to intervene as a defendant, arguing
11 that the Court should grant intervention as of right or, alternatively, on a permissive basis.
12 KRPC opposed that motion because NAB met none of the substantive criteria for intervention
13 as of right, and its intervention would prejudice KRPC. On January 7, 2003, this Court denied
14 NAB's Motion to Intervene.

15 First, this Court concluded that NAB alleged interest did not permit intervention as a
16 matter of right, stating that "NAB's interest in the continued operation of the Red Dog Mine is
17 not sufficiently related to KRPC's suit to enforce the NPDES limits under the FWPCA because
18 NAB has no ownership interest, merely an economic expectation." January 7, 2003 Order from
19 Chambers Re: Motion to Intervene ("Order") at 4. Second, this Court concluded that NAB had
20 no right to intervene because its interest was adequately protected by the existing parties;
21 "NAB's asserted interest in the environmental consequences of the Red Dog Mine's operation,
22 and, in particular, the consequence of the water pollution authorized under the terms of its
23 NPDES permit' is virtually identical to KRPC's interest." Order at 5. Finally, this Court
24 concluded that NAB was not entitled to permissive intervention because it failed to make the
25 threshold showing of claims or defenses that have a question of law or fact in common with the
26 main action. Order at 6.

27 On January 17, 2003, NAB brought the present Motion for Reconsideration. NAB now
28 claims that "the Court erred in its analysis." Proposed Defendant-Intervenor Northwest Arctic

1 Borough's Motion for Reconsideration of Order Denying Intervention and Supporting
2 Memorandum of Law and Request for Oral Argument ("NAB Br."), at 1. NAB argues that this
3 court erred because the Court made no mention of the contract existing between NAB and the
4 defendant and "erroneously characterized the extensive legal obligations imposed by the
5 Northwest Arctic Borough Code[.]" NAB Br. at 4. NAB's Motion does not meet the criteria
6 for reconsideration, and its factual arguments are unsupported. NAB's Motion should be
7 denied.

8 **III. NAB MEETS NONE OF THE CRITERIA FOR RECONSIDERATION.**

9 Reconsideration is appropriate if the district court:

- 10 (1) "is presented with newly discovered evidence,"
11 (2) "committed clear error or the initial decision was manifestly unjust," or
12 (3) "if there is an intervening change in controlling law."

13 *School Dist. No. 1J, Multnomah County, Or. v. ACardS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.
14 1993). Here, NAB presents no newly discovered evidence, makes no argument that there has
15 been a change in controlling law, and can establish neither clear error nor manifest injustice.
16 NAB's Motion should be denied.

17 **IV. NAB'S ASSERTIONS OF ERROR ARE UNFOUNDED**

18 NAB first argues, again, that it has a legally protectable interest, citing two errors by this
19 Court: the failure to mention a contract between NAB and Teck Cominco, and the
20 mischaracterization of the "extensive legal obligations imposed by the Northwest Arctic
21 Borough Code[.]" NAB Br. at 4. Neither of these alleged errors is even factually correct, let
22 alone a clear error requiring reconsideration.

23 **A. The Court committed no error in considering the PILOT agreement.**

24 NAB first criticizes this Court because "the Court made no mention of the contract
25 existing between NAB and the defendant[.]" NAB Br. at 4 (emphasis original). KRPC finds
26 this argument surprising, particularly NAB's emphasis on the "contract" between NAB and
27 Teck Cominco, because nowhere in NAB's original moving papers – not in the 14-page Motion
28 to Intervene, not in the 6-page Affidavit of Roswell Schaeffer, not in the 3-page NAB

1 Resolution, and not in NAB's 16-page Reply – does NAB ever mention the word "contract."
2 This Court can hardly be faulted for not using a word that NAB itself never used. Contrary to
3 NAB's representations, the Court *did* address the *substance* of the issue NAB complains of, the
4 suit's impact on the PILOT agreement between NAB and Teck Cominco. In its order dated
5 January 7, 2003, this Court clearly considered and rejected NAB's argument that, because "the
6 mine is the primary source of revenue for the borough" any "restriction on the mine's
7 operations or adverse affect on TCAK would cause harm to NAB." Order at 3-4. NAB even
8 concedes this in its Motion, NAB Br. at page 10. While the Court did not use the word
9 "contract," neither did NAB; the Court did consider, and reject, NAB's claim of having a
10 legally protectable interest, however. NAB's assertion of error by the Court is simply not
11 supported by the evidence.¹

12 In its attempt to demonstrate the existence of a legally protectable interest, NAB relies
13 heavily on *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993):

14 it should be evident that the Borough has the requisite "protectable interest." Just as the
15 Court stated in *Sierra Club*, supra, it has "contracts or permits" (in this case, both)
16 connected with the continued operation of the mine, and rights that would therefore be
necessarily affected by this lawsuit – in short, the very kind of interest "among those
traditionally protected by law" that would support intervention of right.

17 NAB Br. at 8-9 (emphasis original). This is a significant misapplication of *Sierra Club*. In
18 *Sierra Club*, the Club sued EPA under the Clean Water Act for declaratory judgment and an
19 injunction. The relief sought would have required the EPA to change the terms of permits
20 issued to the City of Phoenix for two wastewater treatment plants owned by the City. The
21 Ninth Circuit granted the City's motion to intervene. Here, however, NAB is neither the holder
22 of the NPDES permits at issue nor the owner of the mine, a far different position than the City
23 of Phoenix which was both owner and permit holder. The Ninth's Circuit's analysis in *Sierra*
24 *Club* turned on the intervenor City's ownership of the waste disposal plants:

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NAB's attempt to offer the PILOT agreement (Exhibit 2 to the Case Affidavit) as evidence
at this stage is improper. A motion for reconsideration requires evidence or argument that
could not have been presented earlier. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir.
1985). The PILOT agreement could easily have been presented with NAB's original motion,
and thus its introduction at this stage is inappropriate. Regardless of whether or not it is
admitted, however, the Court committed no error in denying intervention on January 7, 2003.

1 In the case before us, though, the lawsuit would affect the use of real property owned by
2 the intervenor by requiring the defendant to change the terms of permits it issues to the
3 would-be intervenor, which permits regulate the use of that real property. These
4 interests are squarely in the class of interests traditionally protected by law.

5 995 F.2d at 1483 (emphasis added). In reaching its conclusion, the Ninth Circuit distinguished
6 *Portland Audubon Soc. v. Hodel*, 866 F.2d 302 (9th Cir. 1989), explaining that

7 [u]nlike the loggers in *Portland Audubon*, the City owns rights protected by law relating
8 to the property which is the subject of the action. The loggers' interest in *Portland*
9 *Audubon* appears to have been an economic interest based upon a bare expectation, not
10 anything in the nature of real or personal property, contracts or permits. *The City of*
11 *Phoenix*, by contrast, owns the wastewater treatment plants and permits.

12 *Sierra Club*, 995 F.2d at 1482 (emphasis added). As this Court has already observed, the Ninth
13 Circuit's emphasis clearly falls on the intervenor City's ownership of both the plants and the
14 permits. See Order at n.6.

15 NAB cites to the above passage from *Sierra Club*, however, in support of its argument
16 that NAB's contract with Teck Cominco (an agreement for payment in lieu of taxes) is
17 sufficiently related to plaintiff's suit (seeking to enforce NPDES permits) that the contract
18 constitutes a "protectable interest." This Court has already rejected that argument. Order at 4.
19 Moreover, NAB cannot credibly argue that its contract with defendant, alone, constitutes a
20 "protectable interest" – if this were true, *any* person or business who happened to have a
21 contract with Teck Cominco could intervene as a matter of right. Under NAB's theory, this
22 Court could soon entertain intervention motions from the suppliers of bottled water, airline
23 service, hard hats, office supplies and truck tires to the Red Dog Mine, all of who presumably
24 have contracts with Teck Cominco. An economic stake in the outcome of litigation, however,
25 "even if significant," is not enough by itself to establish a "significant protectable interest."
26 *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993).

27 NAB also argues that its permits for the mine will be affected, as in *Sierra Club*. This
28 assertion fails, though, as here the permits in question are NPDES permits issued by EPA to
Teck Cominco – not permits issued to NAB or by NAB. Nothing in this suit precludes – or,
indeed, even touches on – NAB's enforcement of its own permits to the mine, if it has such
permits.

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1 B. The Court committed no error in characterizing the legal obligations of the
2 Borough.

3 NAB next argues that disposition of the action may impair NAB's ability to protect its
4 interests. NAB Br. at 9. In its Order, this court noted NAB's "obligation to protect the
5 environment, subsistence opportunities, and to promote economically sustainable development
6 for the citizens of the borough." Order at 4. In its Motion for Reconsideration, NAB argues
7 that this court "erroneously characterized the extensive legal obligations imposed by the
8 Northwest Arctic Borough Code." NAB Br. at 4. As it further argues, at NAB Br. at 10-11,
9 Only in a footnote, without other application of those factual interest, however, did the
10 Court in its January 7, 2003 Order also acknowledge the clear relationship between
11 NAB's interest in protecting water and subsistence resources and the goals of the Clean
12 Water Act.... The legal obligations imposed upon the Borough by Title 9 of the
13 Borough's Code will certainly impair its ability to protect this interest.

14 NAB's point here is unclear.² KRPC's suit is a Clean Water Enforcement action and
15 cannot interfere with NAB's operations under the Northwest Arctic Borough Code. Nothing in
16 this suit will impair in any way NAB's ability to regulate local land uses within its jurisdiction.
17 Moreover, NAB fails to describe how these "legal obligations" will impair its ability to protect
18 its interest. Regardless, NAB's argument misses the point: in order to intervene as a matter of
19 right, the *disposition of the action* must impair the potential intervenor's ability to protect its
20 interest – it is not relevant that NAB's interests might be impaired by *legal obligations under*
21 *the Borough's Code*, as it claims. NAB Br. at 11. The Court committed no error in denying
22 NAB the right to intervene.

23 C. NAB's Interests are adequately represented by existing parties.

24 NAB also argues that its interests are not adequately represented by existing parties. In

25 The cases NAB lists in the string cite on pages 11-12 are inapposite. These cases, typically
26 brought by an environmental group against a government agency, involve challenges to broad
27 regulatory programs and request sweeping injunctive relief. On occasion, courts have permitted
28 trade associations to intervene as of right in such actions. The cases NAB lists are unlike the
- i.e., simple enforcement of NPDES permits. As one of the cases cited by NAB points out,
"the circumstances that exist when individuals litigate private disputes or those governed by
state law differ from those where public law disputes affecting federal regulatory programs are
at issue." *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 42
(1st Cir. 1992).

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1 its order of January 7, 2003, this Court described NAB's asserted interest in the environment
2 near the mine as being "virtually identical to KRPC's interest." Order at 5. NAB disagrees
3 with this Court's conclusion: "[w]ith all due respect to the Court, this characterization of
4 KRPC's interest relative to the Borough is both incorrect and unfair and completely
5 misapprehends the nature of NAB's interests, as well as that of the plaintiff." NAB Br. at 13.

6 NAB contends that its interest is different from the plaintiff's: "the Borough's interest
7 in environmental protection extends well beyond Kivalina, unlike the plaintiff's, and is legally
8 mandated and far more comprehensive and balanced by other legal and contractual
9 obligations." NAB Br. at 13-14. NAB cites to no caselaw describing why such a "legally
10 mandated" and "comprehensive and balanced interest" is indeed "protectable."

11 NAB also stresses that "[t]he plaintiff has no legal obligation even to the Village of
12 Kivalina, let alone to the other 10 villages within the Borough nor any duty to their residents or
13 to protect the lands and waters located in the vicinity of Noatak or elsewhere within the
14 Borough outside of Kivalina." NAB Br. at 16. But it bears repeating that KRPC's suit is a
15 Clean Water Act enforcement action predicated on defendant's thousands of violations of its
16 Clean Water Act permits at its mine and port site. KRPC alleges that these violations affect the
17 Village of Kivalina, and its claims are not related to the "other 10 villages within the Borough."
18 Unlike Kivalina, the Village of Noatak does not get its drinking water from sources into which
19 Teck Cominco discharges. In any event, NAB again fails to explain the relevance of its own
20 "legal obligation" to the remaining villages in the Borough – or why this "legal obligation"
21 ensures that its interest is at all distinguishable from KRPC's.

22 NAB also asserts that its interest is different from that of Teck Cominco: "the Borough,
23 unlike the defendant, has a balancing act to perform and must protect the environmental well-
24 being of the Borough and its citizens, as well as the Borough's economic well-being." NAB Br.
25 at 18 (emphases added). NAB cites to no caselaw indicating why this "balancing act" is
26 relevant. And, as this court has already concluded, NAB's interest in "protect[ing] the
27 environmental well-being of the Borough and its citizens" is virtually identical to that of
28 plaintiffs. Order at 5. Nor is NAB's interest in the "Borough's economic well-being" relevant

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1 to the present case – KRPC is suing Teck Cominco to enforce NPDES limits.
2 NAB's motion for reconsideration concludes with a request that the Court allow
3 permissive intervention. In its order of January 7, 2003, this court denied permissive
4 intervention because

5 NAB makes no claims or defenses in its motion, but, instead, focuses on its general
6 interests in the end results of the suit. It is not apparent how these interests asserted in
7 the first part of the motion have a question of law or fact in common with the issue of
8 whether and to what extent TCAK has violated its NPDES permits.

9 Order at 6. NAB's second attempt at making an argument for permissive intervention fails for
10 the same reason. In its Motion for Reconsideration, NAB makes no showing that its claim or
11 defense has a question of law or fact in common with the issue raised by KRPC – whether and
12 to what extent Teck Cominco violated its NPDES permits. Instead, NAB makes the following
13 bare, conclusory assertion: "NAB's defenses respond to the issues of law raised by the
14 plaintiff." NAB Br. at 19. NAB cites to neither the record nor caselaw in support of its
15 assertion. As was true with NAB's original motion, this Court need not consider NAB's
16 arguments regarding delay or prejudice resulting from NAB's intervention since, again, "the
17 threshold showing has not been made." Order at 6.

V. ORAL ARGUMENT IS NOT WARRANTED.

18 Finally, NAB requests oral argument on its Motion because "it is evident there may be
19 controverted facts[.]" NAB Br. at 20. KRPC is aware of no controverted facts. The sole case
20 controverted facts does not support its request for oral argument, as NAB's own quote makes clear. "If
21 the facts are controverted by a party opposing intervention, the Court may... hold a hearing[.]"
22 NAB Br. at 20 (emphasis added), citing *Southwest Center for Biological Diversity v. Berg*, 268
23 F.3d 810, 820 (9th Cir. 2001).³ Here, KRPC is the party opposing intervention, and it is not
24 controverting any facts; there is no need for oral argument.

25 NAB also mischaracterizes this Court's Order to make it seem as if there are
26 controverted facts, in asserting "the Court's assumption that Kivalina may be the 'site of the

27 'NAB is careful not to quote the actual language of *Southwest*, which supports dispensing
28 with oral argument here: "a hearing is not required if it is clear from the face of the application
that the motion must be denied." *Id.* at 820.

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1 alleged illegal discharges" (Order from Chambers, 1-7-03, p.2, n.1) is disputed." The Court's
2 footnote regarding the "site of the alleged illegal discharges" is attached to the end of the phrase
3 "Outfall 001 on the Middle Fork of the Red Dog River," which is, indeed, the site of the alleged
4 illegal discharges. There is no disputed fact here, only NAB's semantic contortions. KRPC
5 requests that no oral argument be held, and that the Motion be denied.

6 VI. CONCLUSION

7 NAB meets none of the three threshold criteria for reconsideration: it offers no new
8 facts, no newly-minted law, and has not established any clear error by the Court. Even were the
9 Court to reconsider its Order, NAB has failed to meet any of the requirements for intervention
10 as a matter of right, nor does it meet the statutory criteria for permissive intervention. NAB's
11 intervention could serve no purpose, and would only prejudice the rights of the original parties
12 to a speedy resolution of the case. NAB's motion should be denied.

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Dated this 31st day of January 2003.

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CENTER ON RACE, POVERTY
& THE ENVIRONMENT



Luke W. Cole

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LAW OFFICES OF THOMAS DOSIK

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Attorneys for Plaintiff
Kivalina Relocation Planning Committee

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CERTIFICATION OF SERVICE

I, Luke W. Cole, am over 18 years of age and not a party to this action. My business address is 450 Geary Street, Suite 500, San Francisco, CA 94102.

On January 31, 2003, I served the PLAINTIFF'S OPPOSITION TO MOTION FOR RECONSIDERATION BY NORTHWEST ARCTIC BOROUGH and [PROPOSED] ORDER DENYING MOTION FOR RECONSIDERATION on the following parties by U.S. mail, postage paid:

Lawrence Hartig
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I certify under penalty of perjury that the above is true and correct. Executed on January 31, 2003 at San Francisco, CA.


Luke W. Cole

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